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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

4
5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
7)
8)

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND
10 THE HONORABLE JENNIFER C. BOAL

11
12 **MOTION HEARING**
13 **AND**
14 **STATUS CONFERENCE**

15
16 John Joseph Moakley United States Courthouse
17 Courtroom No. 12
18 One Courthouse Way
19 Boston, MA 02210

20 March 10, 2016
21 2:00 p.m.

22 Catherine A. Handel, RPR-CM, CRR
23 Official Court Reporter
24 John Joseph Moakley United States Courthouse
25 One Courthouse Way, Room 5205
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on March 10, 2016.)

THE COURT: Please be seated and good afternoon.

COURTROOM DEPUTY CLERK YORK: Today is March 10, 2016. We're on the record in the matter of NECC. The case number is 13-MD-2419.

JUDGE ZOBEL: All right. Can counsel on the telephone hear us?

UNIDENTIFIED SPEAKER: Yes, your Honor.

JUDGE ZOBEL: Good. Thank you.

All right. Ms. Johnson, we go to your agenda, as always.

MS. JOHNSON: Good afternoon, your Honor. Kristen Johnson for the Plaintiffs' Steering Committee.

We have identified as letter (A) motions for which argument is scheduled in the subsequent discovery hearing. So, I think we can turn to (B).

Item 1, the status of the bankruptcy, Mr. Gottfried will address.

MR. GOTTFRIED: Good afternoon, your Honor.

1 I wanted to highlight a filing that we made, I think
2 a couple of days ago, providing notice to all of the parties
3 of the trustee's intention, subject to objection, and then the
4 Court disposing of an objection, if any, to destroy the
5 originals of the documents that have been scanned and will
6 continue to be preserved. The facility is empty at this point
7 with the exception of those documents, and the next step is
8 either to move them to storage or shred them, and we would
9 prefer to save the estate the cost of storing and moving
10 documents which would be duplicative of the scanned documents.
11 So, I wanted to highlight that and indicate that under the
12 Court's modified preservation order, there was a 14-day period
13 to object if there are any objections.

14 JUDGE ZOBEL: Was that notice given to the parties in
15 the criminal case?

16 MR. GOTTFRIED: The only way that, you know, we have
17 to give notice is by -- we filed it in the MDL docket. So, we
18 haven't done any additional notice to those parties. To the
19 extent they are represented in the MDL, they would have
20 notice, but we haven't given any further notice.

21 JUDGE ZOBEL: Well, that would certainly not include
22 the United States.

23 MR. GOTTFRIED: Correct. Though I will say, based on
24 the proceedings with respect to the modified preservation
25 order, they previously had assented, though I'm certainly

1 happy to reach out to them and make sure they're aware of this
2 notice.

3 JUDGE ZOBEL: Are all of the defendants in the
4 criminal case parties in the MDL?

5 MR. GOTTFRIED: I don't know the answer to that. I
6 think not. I don't know for sure.

7 JUDGE BOAL: Mr. Gottfried, you, I believe, entered a
8 notice of appearance in the criminal case because there were
9 some disputes that touched on areas within your purview.
10 Would it be possible to file a notice in the criminal case as
11 well?

12 MR. GOTTFRIED: If the ECF will allow us to, we
13 certainly would be happy to do that if that's the Court's
14 preference.

15 JUDGE ZOBEL: Well, it just seems prudent to do that,
16 because it's not clear to me that the digitized version of
17 these documents is sufficient for the criminal case purposes.
18 Thank you.

19 MR. GOTTFRIED: I will look into that and we will do
20 that. Thank you, your Honor.

21 JUDGE ZOBEL: Okay. Ms. Johnson.

22 MS. JOHNSON: That brings us to the second item,
23 which is the status of the Tennessee declaratory judgment
24 action. Mr. Stranch will address that.

25 MR. STRANCH: Your Honor, the update is there's --

1 nothing has changed since the last time we discussed it.
2 We're still waiting on the Court to rule.

3 JUDGE ZOBEL: Okay.

4 MS. JOHNSON: No. 3, the status of discovery. The
5 Premier defendants have -- as the Court knows, have filed
6 notices of deposition by written question and Judge Boal has
7 issued an order addressing those.

8 There has been a motion to quash filed by Summit
9 Surgery Center on the basis that Summit did not purchase MPA
10 from NECC.

11 Based on the PSC's representations in the earlier
12 briefing, we believe there are other clinics who did not
13 purchase MPA who may have an interest in Summit's motion to
14 quash. It is not clear to the PSC that other clinics have
15 received notice of the pending motion to quash or the
16 potential impact of an outcome on that motion to quash on the
17 pending depositions by written question.

18 JUDGE ZOBEL: So, does anything need to be done to
19 notify the others?

20 MR. WOLK: Well, your Honor -- is this on? Can you
21 hear me, Judge? This is Chris Wolk for the Premier
22 defendants.

23 The motion to quash, I believe, deals specifically
24 with issues that are specific to Summit themselves. I don't
25 think that there's a need for the other clinics in the case to

1 be notified about a motion that doesn't necessarily pertain to
2 them. If relief was to be granted based on Summit's motion,
3 it would apply to Summit. It would be the responsibility of
4 the individual clinics themselves, if they felt it necessary,
5 to file a similar motion. So far, some of the clinics have
6 indicated they may do that on their own, because they've
7 retained counsel and counsel has reached out to me to say that
8 they would do that. Others have not and, still, other
9 depositions by written questions have been completed with no
10 motion practice at all.

11 So, at this point it would be Premier's position
12 that, in fact, the clinics do not need to be notified about
13 the motion to quash, and the reason for that, in addition to
14 what I've explained, is that it may suggest to them that they,
15 in fact, should do the same thing when, perhaps, there is no
16 basis to do that. So, I don't want to muddy the waters here
17 on a process that's already proven to be a little bit
18 difficult logistically because of the location of some of
19 these clinics and just getting out the deposition by written
20 question themselves. I wouldn't want to complicate that by
21 notifying them of something that isn't necessarily related to
22 them, especially when other clinics have expressed to us that
23 they're thinking about filing a motion. They're well within
24 their right to do that, but may have not done that already.

25 MR. KIRBY: Your Honor, if I may. Greg Kirby on

1 behalf of the Box Hill defendants.

2 We also served Rule 31 deposition notices and
3 subpoenas on several clinics, and we received an email from
4 the Plaintiffs' Steering Committee suggesting that they wanted
5 to notify the entities that we noticed for deposition as well
6 under Rule 31 and let them know about this motion to quash
7 filed by an entity that has nothing to do with ours and, as
8 matter of fact, all of the deponents that we noticed, I think
9 -- that we served, save one, is scheduled -- have already been
10 scheduled and I think the majority have already even happened.
11 So, I just don't think it's appropriate to muddy the waters
12 and kind of obstruct validly, properly-served subpoenas.

13 JUDGE ZOBEL: Okay. Okay with you?

14 JUDGE BOAL: Yes. Obviously, there's no reason why
15 people can't tell other people about what's on the public
16 docket, but I'm not sure additional official notice needs to
17 be provided.

18 MS. JOHNSON: Your Honor, I think one of the, perhaps
19 not obviously -- well, let me just say, I'm not clear that the
20 PSC has contact information for these clinics or for the
21 attorneys for these clinics. I believe that's in the hands of
22 Premier and Box Hill. So, I think that is one of the reasons
23 that we have not reached out to them to informally alert them
24 to the filing on the docket.

25 JUDGE ZOBEL: So, yet another reason to leave things

1 as they are?

2 MS. JOHNSON: Well, I would suggest, respectfully,
3 your Honor, it may be a reason to have Premier at least alert
4 them that there are proceedings that involve the question of
5 whether or not an entity purchased and if an entity didn't
6 purchase, there's at least an argument that they -- given
7 Judge Boal's thorough reasoned opinion, there may be a reason
8 that they ought not respond to the subpoena, but we're content
9 to do what the Court thinks best in the situation.

10 JUDGE ZOBEL: I think we'll leave things where they
11 are.

12 MS. JOHNSON: That brings us to Item -- well, Item B,
13 I suppose, we've addressed. That's the Box Hill notice of the
14 deposition by written question.

15 Item C is really just by way of update. There's been
16 an assented-to motion to extend the common discovery deadline
17 to June 1st in the Premier cases.

18 JUDGE BOAL: So, I have two questions. We had
19 Premier and Box Hill on different schedules. They're now on
20 the same schedule. So, is there any objection to Box Hill
21 being on the same schedule, based on the recently-filed
22 motion?

23 MR. KIRBY: And let me just add -- I'm glad you
24 brought that up. The plaintiffs already agreed to an
25 assented-to motion to extend our common issue fact discovery

1 deadline to June 1st as well. I just have to draft it and
2 send it to them.

3 JUDGE ZOBEL: Well, you don't need to draft it. I'll
4 just include you in this decision.

5 MR. KIRBY: Thank you.

6 JUDGE BOAL: So, the other question that I had about
7 this, if I remember correctly, we had only scheduled out
8 Premier and Box Hill to a certain extent. I don't think we
9 gave you deadlines for common expert discovery, et cetera.
10 So, what I would -- is that correct?

11 MR. WOLK: That's correct, your Honor. We don't need
12 to extend common issue --

13 JUDGE BOAL: All right. So, what I would ask is that
14 -- for you and the PSC to work up a schedule -- proposed
15 schedule, obviously, jointly if you can, and separately, if
16 necessary, and to file something within two weeks about the
17 rest of this schedule, and if it's disputed, we can take it up
18 at the next conference and if not, I'll endorse the schedule,
19 assuming it's reasonable.

20 MR. WOLK: That's fine, your Honor.

21 MS. JOHNSON: Would the Court be interested also in
22 extending out through a proposed Bellwether process? Meaning,
23 we're happy to provide whatever schedule the Court would like.
24 I'm wondering how far out the Court would like us to play the
25 schedule.

1 JUDGE ZOBEL: I think we'll come to that in a moment.

2 MS. JOHNSON: Okay. That brings us to 3(d), the
3 Court rulings update. On the first item, the Court has
4 allowed the protective -- those qualified protective order.
5 The PSC is optimistic that this will help us to resolve
6 private liens which will hasten the sending out of checks.

7 On (d)ii the Court had also granted the emergency
8 motion to extend the common expert discovery deadline until
9 April 9th.

10 That brings us to 4, the status of --

11 MS. GREER: Your Honor, if I may interrupt. Marcy
12 Greer for the Saint Thomas Entities.

13 We had filed a proposed supplement to the agenda
14 asking that the next item that is to be presented be heard as
15 an oral argument.

16 JUDGE ZOBEL: I think not. We've had extensive
17 briefing. In fact, here's all the briefing (indicating). I
18 think that's enough. Thank you.

19 Well, if we are ready for that, then let me tell you
20 what -- I have decided the order of what the Bellwether trials
21 should be, except I have now mucked up my papers. We will
22 start with Wray, continue with Temple. Then I think it's
23 McElwee or *McElwee*, I think --

24 MR. STRANCH: *McElwee*.

25 JUDGE ZOBEL: And Skelton, in that order, and I have

1 taken into account the nature of the impact on each of these
2 plaintiffs, any difficulties that might not be representative
3 of all of them. For example, one of the plaintiffs also has
4 multiple sclerosis which would make it difficult to carry over
5 any result to other cases. Some of them have some liability
6 issues, statute issues, and those we decided would be at the
7 end of the list after the four. So, those are the four that
8 we're going forward with.

9 Now, the plaintiffs have suggested that they might be
10 ready as to some cases, not necessarily these, in June. I
11 think that may be too optimistic and I am proposing that we
12 try one case in July, one in -- I'm assuming cases would take
13 maybe two weeks to try, not more than that. If it's
14 substantially less, then maybe we'll think about it
15 differently, but I'm proposing one in July, one in August, one
16 September, one in October.

17 MR. HOFFMAN: Your Honor, my name is Eric Hoffman for
18 the Saint Thomas Entities. I'm speaking for Yvonne Puig and
19 Adam Schramek who are partners on this case. I know that they
20 cannot do July due to unavoidable commitments. So, July would
21 not work for the Saint Thomas Entities.

22 JUDGE ZOBEL: Well, we may have to hear more detail
23 about that before we decide to move it --

24 MR. HOFFMAN: Sure. We would happy to file --

25 JUDGE ZOBEL: -- all of July and we can do it

1 beginning or the end, but I would be loath to just give up the
2 entire month.

3 MR. HOFFMAN: Sure. Your Honor, if we may, may we
4 file a supplement explaining --

5 JUDGE ZOBEL: Absolutely.

6 MR. HOFFMAN: Thank you, your Honor.

7 JUDGE ZOBEL: But you will have to work hard to
8 persuade me that July is off the list.

9 MR. HOFFMAN: Thank you, your Honor.

10 JUDGE ZOBEL: So, that takes care of...

11 MS. JOHNSON: I believe that concludes 4(a), your
12 Honor.

13 JUDGE ZOBEL: But I lost your agenda. Here it is.

14 Okay. Now 4(b).

15 MS. JOHNSON: 4(b), update on common expert
16 discovery. Again, Mr. Stranch.

17 MR. STRANCH: Your Honor, the update will be very
18 brief. As you may recall, at the last status conference there
19 was a discussion about extending the deadline for common
20 experts briefly so that we could get every schedule --

21 THE COURT: That was done.

22 MR. STRANCH: That was done. All the expert
23 depositions have now been scheduled, I think, except for one
24 because it had to be rescheduled because of an unavoidable
25 conflict with the expert. Most of them have now been taken.

1 There are still more going on and we anticipate having them
2 all completed before the deadline of April 9 that the Court
3 set.

4 JUDGE ZOBEL: Thank you.

5 MS. JOHNSON: That brings us to 4(c), your Honor, the
6 Court rulings update.

7 MR. TARDIO: Your Honor, can I ask a question that I
8 think fits in this discussion for --

9 JUDGE ZOBEL: I'm sorry. Would you identify
10 yourself, please.

11 MR. TARDIO: Yes. Chris Tardio for Saint Thomas
12 Out-Patient Neurosurgical Center and various other Tennessee
13 defendants.

14 As I understand what the Court just said, we've got
15 four trial cases and the Court set out the sequence. We are
16 -- the plaintiffs have disclosed case-specific experts and our
17 deadline to disclose our case-specific experts I think is
18 April 7th, and I wonder whether it makes any sense for us to
19 disclose case-specific experts in cases that are not in the
20 first four trial cases and I --

21 JUDGE ZOBEL: Why do you think that that may be a
22 good idea?

23 MR. TARDIO: Not to do so? Because --

24 JUDGE ZOBEL: Or to do so.

25 MR. TARDIO: That's my suggestion, that maybe it

1 doesn't make any sense for us to engage case-specific experts
2 and disclose them and take the time and expense to do reports
3 in the, I think, three cases that are not in the first four
4 trial cases. So, that would -- my suggestion to the Court and
5 to the PSC would be that we disclose case-specific experts
6 only in Wray, Temple, McElwee and Skelton for now.

7 JUDGE ZOBEL: Mr. Stranch.

8 MR. STRANCH: Yes, your Honor. We think -- for the
9 PSC, we think it would make sense to go ahead and continue to
10 prep all the cases, because after these four cases go, there's
11 going to be other cases that are going to need to be tried.
12 We've disclosed all our case-specific experts, even for the
13 ones -- not these four. And so, that should take --

14 JUDGE ZOBEL: So, you're talking about three more?

15 MR. STRANCH: Three more. That's all it is. And
16 that way, they're ready if those cases need to be tried or
17 not. You know, if there was some concerted effort to try to
18 mediate and resolve this case, maybe it would make sense to
19 save some on that, but, you know, that's not really happening
20 right now, and if the Court wants an update on what is going
21 on with that, I would be happy to provide that.

22 MR. TARDIO: How about this? How about if the Court
23 is intent on agreeing with Mr. Stranch, that we need to
24 disclose in these, I think, three remaining cases, I would
25 suggest that we just don't take the depositions yet. I don't

1 think there's any reason to take case-specific expert
2 depositions in the three cases that are not going to be in the
3 first trial set.

4 MR. STRANCH: Yes. Your Honor, one of these four
5 cases could resolve, you know, one of these cases could be,
6 you know, removed from trial due to settlement or other
7 reasons. We need to have other cases ready to take their
8 place. And so, we think they should continue going forward as
9 it is. I mean, one of these plaintiffs might pass away. It
10 might change the nature of the case. And so, they might need
11 to be bumped and we need to have other cases that can step in
12 to fill those slots if that does happen, and we're not really
13 talking about a lot of additional work. It's just three more
14 cases, and there's a lot of overlap in the experts as well,
15 your Honor. And so, it's really not adding an additional
16 large amount of work to this.

17 JUDGE ZOBEL: Are the experts -- the expert
18 depositions have not yet been taken or have they?

19 MR. TARDIO: Not the case-specific expert
20 depositions. Common expert depositions are --

21 JUDGE ZOBEL: So, all we're talking about is case
22 specific. And are the experts different from the four that
23 are now on the actual trial list?

24 MR. TARDIO: Some will overlap. Some will not.

25 JUDGE ZOBEL: How many overlap?

1 MR. TARDIO: I don't know, your Honor.

2 JUDGE ZOBEL: It seems to me, at the very least, the
3 overlapping ones should cover everybody.

4 MR. TARDIO: I understand. And maybe it would be
5 best for us to talk --

6 JUDGE ZOBEL: I think so.

7 MR. TARDIO: -- and see if we can work out some
8 resolution where even if we could cut out a deposition or two,
9 it may help.

10 JUDGE ZOBEL: Mr. Stranch is right that although
11 there is now a list, it's not cast in stone because we don't
12 know what will happen with respect to plaintiffs' lawyers, or
13 whatever. So, I think it makes a certain amount of sense to
14 have all of them ready to go with minimal last-minute stuff.
15 So, talk to each other and see what you can work out and if
16 there's a problem, you'll let us know.

17 MR. TARDIO: Thank you, your Honor.

18 MR. STRANCH: Thank you, your Honor.

19 JUDGE ZOBEL: Thank you.

20 Now, we were at Court's rulings update.

21 MS. JOHNSON: Yes. And just to quickly acknowledge,
22 your Honor, the Court since the last status conference has
23 granted the Ocean State motion to dismiss and also has entered
24 an order and opinion on the cross-motion for summary judgment
25 dealing with the Tennessee product liability issue.

1 And then, your Honor, that brings us to 4(d), status
2 of the entry of final judgment as to settling parties, and I
3 believe Ms. Ragosta on behalf of ARL had requested that that
4 be added to the agenda.

5 JUDGE ZOBEL: I thought that was done. Are we still
6 not -- we still don't have orders on parties that have
7 settled?

8 MS. JOHNSON: We thought it had been done, your
9 Honor. I'm not sure of the nature of Ms. Ragosta's concern on
10 that topic.

11 JUDGE ZOBEL: I'm sorry. Who is the person who is
12 speaking on this, who will speak on it?

13 MS. JOHNSON: Ms. Ragosta, R-a-g-o-s-t-a.

14 THE COURT: Is Mr. (sic) Ragosta here or on the line?
15 Here? I'm sorry?

16 MS. JOHNSON: She's on the phone.

17 JUDGE ZOBEL: So, Mr. Ragosta, can you tell us what
18 the problem is?

19 MS. RAGOSTA: Yes, your Honor.

20 JUDGE ZOBEL: Oh, Ms. Ragosta. Sorry.

21 MS. RAGOSTA: That's okay.

22 From a review of the docket, the cases are still
23 active against ARL. So, it didn't appear that they had been
24 -- final judgment had entered. I didn't receive any notice of
25 final judgment entering either .

1 JUDGE ZOBEL: Did we enter one judgment in all of
2 these cases or were separate judgments entered in each case?

3 MS. JOHNSON: I think I understand that, your Honor.
4 The Court entered a final judgment. We then went through a
5 process where the PSC provided a list to the Court of cases
6 that were to be dismissed over which final judgment should be
7 entered.

8 I'm not clear whether the Clerk has actually entered
9 judgment in whatever the ministerial fashion is in terms of
10 clicking the box on the computer screen such that the
11 electronic version of the docket shows that judgment has been
12 entered.

13 JUDGE ZOBEL: The one judgment listed all the cases
14 separately?

15 MS. JOHNSON: No, your Honor.

16 JUDGE ZOBEL: Or was it in the MDL?

17 MS. JOHNSON: It was in the MDL.

18 THE COURT: So, what is missing is the individual --
19 judgment in the individual cases?

20 MS. JOHNSON: Yes, your Honor.

21 JUDGE ZOBEL: Okay. Would you have a better handle
22 on the missing ones or would Ms. Ragosta? I'm asking Ms.
23 Johnson, Ms. Ragosta.

24 MS. JOHNSON: I think we do. The PSC has provided to
25 the Court previously a list of those cases for which final

1 judgment should be entered.

2 JUDGE ZOBEL: And that list obtains today?

3 MS. JOHNSON: That list obtains today.

4 JUDGE ZOBEL: So, it is now our job to go over that
5 list and make sure that the Clerk clicks all the necessary
6 buttons?

7 MS. JOHNSON: Yes, your Honor. And to the extent
8 there is anything further that we could provide to assist the
9 Clerk's Office in that, whether -- I don't know if it's a
10 workable Excel file or something like that would be helpful,
11 we're glad to do that.

12 JUDGE ZOBEL: Well, have any of them been entered? I
13 mean, has the Clerk taken that list and entered any of them?
14 None of them?

15 So, I think our job now is to enter them and once
16 that is done, if any are missing, you will let us know, and
17 Ms. Ragosta as well. I'm sorry about that, but I will make
18 sure that the Clerk gets it done.

19 MS. JOHNSON: Thank you, your Honor.

20 And without complicating things, I do want to point
21 out when the PSC provided that list, it provided a second list
22 that identified actions where some defendant was still
23 remaining. So, final judgment would not be appropriate, but
24 we provided a list of actions in which all of the settling
25 defendants should be dismissed out.

1 It's unclear to me whether there is an action that
2 the Clerk would take in that situation because the cases are
3 still live, but just to explain to the Court there are two
4 lists out there.

5 JUDGE ZOBEL: So, they're Rule 54-like motions?

6 MS. JOHNSON: Correct.

7 JUDGE ZOBEL: I think what I will do is ask Ms. Urso
8 or the Docket Clerk to work with counsel to make sure that we
9 do it right.

10 MS. JOHNSON: And we will be happy to help in any way
11 we can, your Honor.

12 JUDGE ZOBEL: Okay.

13 MS. JOHNSON: That brings us to Item 5, the report
14 from the pro se liaison.

15 MS. MARTIN: Good afternoon, your Honor.

16 As you recall, last time we discussed --

17 JUDGE ZOBEL: You had no report the last time.

18 MS. MARTIN: Well, no. I had a little update on the
19 process with Judge Neiman to deal with the nine pro se's that
20 he denied their appeals. And so, he instructed those pro se's
21 to contact me if they wanted my assistance in filing a motion
22 with the bankruptcy court to allow their late claims.

23 As of today, six of the nine have contacted me. That
24 motion is due on March 25th. So, we'll see if any of the
25 others contact me in that interim, and I will file a motion

1 with the bankruptcy court by that date and, hopefully, their
2 claims will all be allowed and we can move forward.

3 JUDGE ZOBEL: Thank you.

4 MS. JOHNSON: That brings us to No. 6, the schedule
5 for future status conferences.

6 JUDGE ZOBEL: Now, we have a date in April and a date
7 in May. Do we need to set one for June?

8 MS. JOHNSON: Yes, please, your Honor.

9 JUDGE ZOBEL: Do you have the calendar, Steve?

10 COURTROOM DEPUTY CLERK YORK: I do, your Honor.

11 (Discussion off the record at the Bench.)

12 JUDGE ZOBEL: What date in June were you looking for,
13 Ms. Johnson?

14 MS. JOHNSON: I would suggest either Thursday, the
15 16th, or Thursday, the 23rd.

16 JUDGE ZOBEL: So, let's do the 23rd, since that
17 appears to be open on my calendar. Is it okay for you?

18 JUDGE BOAL: Yes, it's fine for me, but we have a
19 trial scheduled that morning. So, I'll have to hear any
20 motions at three o'clock that day.

21 MR. STRANCH: Your Honor, would you anticipate using
22 that date also as a final pretrial conference for the July
23 trial?

24 JUDGE ZOBEL: I hadn't really thought about that. I
25 don't know that we need all 40 lawyers on the telephone for

1 the pretrial. We need only those who are actually going to be
2 involved in the trial. So, we can set a separate date. We
3 don't have to take that time.

4 MR. STRANCH: Okay.

5 THE COURT: I mean, maybe it makes sense to do it at
6 the same time, but I'm not sure.

7 MR. STRANCH: Okay.

8 THE COURT: It certainly involves a rather fewer
9 number of people than are here today.

10 MR. STRANCH: That's correct.

11 JUDGE ZOBEL: Okay. I'll think about that. Would it
12 be more convenient for counsel if we did it on this day?

13 MR. STRANCH: It would probably be more convenient --

14 (Unidentified person speaking on the telephone.)

15 MR. STRANCH: Yes, your Honor, it would probably be
16 more convenient for us to do it at the same time.

17 (Unidentified person speaking on the telephone.)

18 JUDGE ZOBEL: I'm sorry. Who is speaking?

19 MS. JOHNSON: Could counsel on the telephone
20 please --

21 JUDGE ZOBEL: It's very strange to have these
22 disembodied voices, where they come from.

23 Okay. So, June 23rd, at 2:00, is the next meeting.

24 Now, if Judge Boal has to take part of the afternoon
25 for her part, then maybe what I should do is see what my

1 schedule is in the morning -- I don't know at the moment --
2 and maybe have the pretrial in the morning.

3 MR. STRANCH: That would be fine, your Honor, or we
4 could do it the day before or the day after. We can be
5 flexible, but if we're all already going to be here, it would
6 just make sense to go ahead and do it at the same time.

7 JUDGE ZOBEL: Okay. So, pretrial in July cases on
8 6/23 a.m. or 6/22. Okay. Thank you.

9 MS. JOHNSON: That brings us to Section C, your
10 Honor. There is one fully-briefed motion. However, oral
11 argument on that has been waived. So, that is to be decided
12 on the papers, according to the parties' agreement.

13 JUDGE ZOBEL: This is the Saint Thomas motion for
14 summary -- global motion for summary judgment, is that what
15 you're talking about? So, that should be decided on papers?

16 MS. JOHNSON: Well, it's their request for leave to
17 file that motion that should be decided on the papers.

18 MS. GREER: Your Honor, that motion was granted
19 yesterday.

20 JUDGE ZOBEL: The motion for leave to file was
21 allowed. So, the only question is whether we need argument on
22 the motion itself, on the substantive motion.

23 MS. GREER: Your Honor, may I address that?

24 JUDGE ZOBEL: Yes.

25 MS. GREER: We are going to get the motion on file as

1 quickly as possible. We already have all the exhibits and the
2 motion, of course, is done. The only question is that many of
3 those exhibits are under confidentiality under the protective
4 order, and we understood that we would have some sort of
5 protocol in place for determining what is submitted under seal
6 and what is not. Obviously, the motion itself would not be
7 under seal, but a lot of the documents --

8 JUDGE ZOBEL: I can give you a short answer on that,
9 which is that I wish counsel to get together and sort of
10 ignore the procedural order, the discovery order, protective
11 order, and decide what is actually necessary to be
12 confidential and not just because the lawyer said it's
13 confidential, but whether it is actually confidential, and
14 whatever is not actually confidential should be filed as part
15 of the public record and everything else, if there is
16 anything -- I hope nothing -- can be filed under seal with
17 redaction in the public papers.

18 MS. GREER: Okay, your Honor. We will get it on file
19 as quickly as we can.

20 JUDGE ZOBEL: Thank you.

21 MS. JOHNSON: That brings us then to the briefing in
22 progress section of the agenda, your Honor, and unless anyone
23 in the courtroom or on the phone feels otherwise, I don't
24 think there's anything to address in these motions today.

25 MR. WOLK: Your Honor, just very briefly. I just

1 wanted to bring up that I filed a notice of extension for ten
2 days more to respond to the Summit motion to quash. I filed
3 that last night. I'm just going to assume that the deadline
4 is --

5 JUDGE ZOBEL: Which one is that?

6 MR. WOLK: It's (b).

7 JUDGE ZOBEL: No. 1(b)?

8 MR. WOLK: Yes. So, I'll just assume that the
9 deadline will now be ten days beyond because of the standing
10 order.

11 JUDGE BOAL: Yes, I think that was the agreement --
12 the protocol that's been established.

13 MR. WOLK: Very good. Thank you.

14 JUDGE BOAL: I had a question, unless Judge Zobel is
15 going to -- so, we have a schedule now, obviously, for the
16 Tennessee cases and then the New Jersey and Maryland cases,
17 and I know we said that we would put off a schedule for the
18 small-clinic cases. Are there any other groups of cases for
19 which we should work on a schedule?

20 MS. JOHNSON: That's a very good question, your
21 Honor. I would suggest that the PSC go back and look at the
22 roster of remaining cases in the MDL, in part, after --
23 perhaps after the Clerk has entered these judgments so that we
24 have a better sense of what's really remaining, and perhaps we
25 could file a short -- I don't know -- two- or three-page

1 something with the Court to at least advise you as to our
2 position on what else may be appropriate for scheduling now.

3 JUDGE BOAL: That sounds appropriate.

4 MS. JOHNSON: Okay.

5 JUDGE ZOBEL: Let me go back for a moment to the
6 global motion for summary judgment. When will that be ripe
7 for hearing or decision?

8 MS. GREER: I believe they get 21 days to respond.
9 So, it would be ripe for decision for the next hearing if we
10 can get it on file by the end of the week. The only thing I
11 can't promise is just because of the confidentiality, but
12 we've already got the exhibits together. They're marked,
13 ready to go.

14 JUDGE ZOBEL: Is a hearing required on the motion?

15 MS. GREER: We would like to have a hearing on the
16 motion, your Honor.

17 JUDGE ZOBEL: So, you will try to get it done by the
18 April hearing or conference?

19 MS. GREER: That would be our preference, at least.

20 JUDGE ZOBEL: Okay. If not, we would do it the
21 following month.

22 MS. GREER: We're going to do everything in our power
23 so it will be ripe for that hearing.

24 JUDGE ZOBEL: Thank you.

25 Is there -- now, you had nothing else and Ms. Johnson

1 had nothing else. Is there anything else that somebody else
2 has? Anybody on the telephone?

3 (No response.)

4 JUDGE ZOBEL: I guess we're all done. Thank you very
5 much, as usual.

6 MS. JOHNSON: Thank you.

7 COURTROOM DEPUTY CLERK YORK: Court is in recess.
8 All rise.

9 JUDGE ZOBEL: We are in recess.

10 (Recess taken.)

11 THE FOLLOWING TAKES PLACE BEFORE JUDGE BOAL:

12 COURTROOM DEPUTY CLERK YORK: For counsel on the
13 phone, we're going to start the portion before Judge Boal. I
14 just want to double-check that the AG from Tennessee is on the
15 line. Can anyone hear me?

16 (No response.)

17 COURTROOM DEPUTY CLERK YORK: Do we still have
18 counsel on the phone?

19 UNIDENTIFIED SPEAKER: We can hear you.

20 COURTROOM DEPUTY CLERK YORK: Okay. And I believe...

21 JUDGE BOAL: She may not be on the line because we
22 said we would start at three o'clock. So, Mr. York is going
23 to try to get her on the phone.

24 (Discussion off the record.)

25 COURTROOM DEPUTY CLERK YORK: Do we have Ms.

1 Bergmeyer joining us on the line yet?

2 Just so -- counsel on the phone, if you're not
3 speaking in the motion, can you just please put your phone on
4 mute and just listen so as not to disturb the conference.

5 (Discussion off the record.)

6 MS. BERGMEYER: Hello. This is Stephanie Bergmeyer
7 and I just joined the conference call.

8 COURTROOM DEPUTY CLERK YORK: We'll get started
9 again. Today is March 10th, 2016. We're on the record in the
10 matter of NECC. The case number is 13-MD-2419. Will counsel
11 in the courtroom please identify yourselves for the record.

12 JUDGE BOAL: Actually, I think just counsel who are
13 going to speak on the motion will be fine.

14 MR. CHALOS: Mark Chalos for the plaintiffs.

15 MR. TARDIO: Chris Tardio for the Tennessee clinic
16 defendants.

17 MS. BERGMEYER: Stephanie Bergmeyer for the State of
18 Tennessee.

19 JUDGE BOAL: All right. So, it's the Tennessee
20 clinic defendants' motion. I'll hear you first.

21 MR. TARDIO: Thank you, your Honor.

22 And I realize this issue is one that can go about a
23 half dozen different ways. So, I'll see if I can at least lay
24 out for the Court the Tennessee clinic defendants' position.

25 JUDGE BOAL: It was very interesting in that sense.

1 MR. TARDIO: It is interesting. It's almost like a
2 law school exam question --

3 JUDGE BOAL: Yes.

4 MR. TARDIO: -- with all the issues, procedural and
5 otherwise, that come up, but basically Tennessee has a statute
6 that the legislature passed within the last few years that
7 changed the common law. At common law, ex parte communication
8 with plaintiffs' treating providers was not allowed under the
9 *Givens* case and the *Alsip* case. The legislature as part of
10 the Healthcare Liability Act -- or an amendment to the
11 Healthcare Liability Act passed Section 121(f), which reversed
12 the common law -- not necessarily reversed the common law, but
13 certainly changed the common law, and put in place a -- to use
14 the language of the statute, gave defendant healthcare
15 providers the right to seek permission to speak ex parte with
16 treating healthcare providers.

17 So, in state court, the process goes you file the
18 motion, you say who you want to talk to, and the court,
19 pursuant to statute, enters the order in most cases, with some
20 argument about terms.

21 We filed a similar motion. Of course, we're in
22 federal court which raises different issues, but our position,
23 first and foremost, is that the statute is a substantive
24 provision that we submit requires this Court to apply the
25 state law, the state process, the state statute, 121(f), which

1 would allow us to have this order consistent with the
2 statutory provisions and requirements.

3 JUDGE BOAL: If I remember reading your brief
4 correctly, you had said that Tennessee federal courts had
5 established that the law in question is substantive, but I
6 didn't see any case cites to that.

7 MR. TARDIO: The Tennessee courts have ruled that
8 other parts of 121 are substantive. The pre -- the Tennessee
9 federal courts have applied the pre -- all of 121 is the
10 Healthcare -- or all of 101 through 121 is the Healthcare
11 Liability Act and the federal courts have applied all those
12 provisions, with the exception of 121(f), except for the
13 *Lovelace* opinion that was attached as an exhibit to the
14 Tennessee AG's brief, and in *Lovelace* the Court did make a
15 determination that HIPAA -- I think, as I read *Lovelace*, the
16 court ruled that it's a procedural provision, but that HIPAA
17 doesn't preempt it.

18 So, again, this issue can go three or four different
19 ways. First and foremost, we submit that it's a substantive
20 provision which requires the application of Tennessee state
21 law. If the Court disagrees with that argument and believes
22 the provision is procedural, we submit, respectfully, that
23 121(f) is not contrary to HIPAA, not contrary to the Federal
24 Rules of Civil Procedure, and then under 121(f) or under Rule
25 26 -- Federal Rule of Civil Procedure 26 or under HIPAA, the

1 Court can enter an order that allows us to have access
2 informally to treating providers.

3 So, we in the brief lay out our position, which is
4 whichever road the Court goes down, we think the Court has
5 authority to enter an order such that we are asking.

6 One final note, the reason these interviews are
7 important to defenses: We do not have without an order from
8 this Court access to these healthcare providers, who in
9 certain cases can provide very important testimony. They're
10 not experts. They're experts by virtue of their field.
11 They're not experts in the sense that they're Rule 26 experts
12 that treat --

13 JUDGE BOAL: You're not suggesting you couldn't issue
14 a subpoena to them?

15 MR. TARDIO: We could issue a subpoena to them. The
16 problem is in -- we're going to be trying this case in Boston.
17 They're in Tennessee. We walk in. We take their deposition
18 without ever having talked to them and we're likely stuck with
19 that testimony if they're subpoenaed to testify at trial, and
20 it's a severe disadvantage, as with any witness, not knowing
21 what the witness is going to say before you walk into the
22 deposition, and it's particularly difficult in this situation
23 where one side will likely know what the witness is going to
24 say and one side will not. So, that's why the interviews are
25 important to us and are important to the process.

1 If we accept that the Federal Rules of Civil
2 Procedure and the entirety of the rules are written such that
3 in federal courts there's this mutuality of information, that
4 each side has an even set of facts instead of information
5 going into trial, we would respectfully ask the Court that
6 even if the Court decides that the Court is going to apply the
7 Federal Rules of Civil Procedure, that even under Rule 26
8 we've demonstrated a good cause for such an order. Thank you,
9 your Honor.

10 JUDGE BOAL: You had also argued under Rule 501. My
11 understanding -- obviously, you would know better than I --
12 that Tennessee does not have a state physician/patient
13 privilege; is that correct?

14 MR. TARDIO: There is no statutory privilege and the
15 case -- it depends on how strictly we construe the word
16 "privilege." There's a covenant of confidentiality at common
17 law that does not allow a physician absent some court approval
18 to disclose confidential information. So, whether that's a
19 privilege or not, it's not a statutory privilege. It's a
20 common law covenant of confidentiality.

21 JUDGE BOAL: Thank you.

22 MR. CHALOS: Good afternoon, your Honor. I want to
23 make a few points on behalf of the plaintiffs.

24 First, this is a procedural statute. There is no
25 court in Tennessee that has found otherwise, that has found

1 that it's substantive. The *Lovelace* court, which is the
2 Western District of Tennessee, did not address that issue, and
3 I went and looked at the briefs. It was never raised. So,
4 the plaintiffs there didn't make the argument that this was a
5 procedural statute, but it is, and your Honor need look no
6 further than the Tennessee courts to see that in the
7 *Dean-Hayslett* case, which we've cited, the court calls this a
8 pretrial investigatory procedure, and that's on Page 12 of the
9 *Dean-Hayslett* case.

10 In the *Alsip* case -- which, as an aside, is still
11 good law. It is good substantive law in Tennessee that there
12 is an implied covenant of confidentiality between doctors and
13 patients, and that is substantive law that survives the
14 enactment of 121(f), and we've got, your Honor -- which we'll
15 get to in just a minute, but courts in Tennessee have
16 recognized that. They've recognized that *Alsip* is still good
17 substantive law.

18 So, this is a procedural statute. As such, in
19 federal court it is inapplicable. Your Honor has the Federal
20 Rules of Civil Procedure. Your Honor has HIPAA to guide your
21 Honor in this respect. You need not even reference the
22 statute.

23 We do think it would be preempted by HIPAA, but I
24 don't think your Honor needs to get to that question, given
25 that it is a procedural statute and your Honor is not bound by

1 it.

2 JUDGE BOAL: If Tennessee law applies, then don't the
3 defendants meet the criteria for the issuance of the
4 protective order?

5 MR. CHALOS: Yes.

6 JUDGE BOAL: And the defendants have relied on the
7 *Goldstein* case that was issued by Judge Zobel, and I don't --
8 unless I missed it, I don't believe that the brief -- your
9 brief had distinguished that case. Why do you think that I
10 shouldn't rely on that?

11 MR. CHALOS: That's the Massachusetts case?

12 JUDGE BOAL: Yes.

13 MR. CHALOS: Your Honor, I don't remember exactly the
14 holding in that case, but I know it was considering
15 Massachusetts law and not this unique sort of circumstance
16 that we're in here with this Tennessee procedural statute,
17 which --

18 JUDGE BOAL: It's almost the reverse, but I think the
19 defendants are arguing that it's applicable for some of the
20 holdings. In that case she was considering -- there was a
21 Massachusetts law prohibiting ex parte communication.

22 All right. Anything from the Tennessee AG's Office?

23 MR. CHALOS: I'm sorry. May I be heard on one more
24 point?

25 JUDGE BOAL: All right. Tennessee AG's Office should

1 hold off. Go ahead.

2 MR. CHALOS: I think that case may have been pre-
3 HIPAA, if I remember right. I'm not 100 percent certain about
4 that.

5 JUDGE BOAL: 1995.

6 MR. CHALOS: Yes. Okay. I'm sorry, your Honor.

7 JUDGE BOAL: All right. Go ahead, Tennessee AG's
8 Office.

9 MS. BERGMAYER: Yes, your Honor. This is Stephanie
10 Bergmeyer, and I want to thank you for hearing us today.

11 We have thoroughly briefed the HIPAA preemption issue
12 and we certainly rely on that brief, but, quite simply, we
13 believe that the *Lovelace* decision in the Western District of
14 Tennessee was correct and should be followed by this Court,
15 and it very clearly outlines why HIPAA does not preempt 121(f)
16 and why 121(f) does contain protections for a plaintiff's
17 privacy, and we would submit that that should be followed in
18 the event your Honor does need to decide whether HIPAA
19 preempts the statute.

20 And, otherwise, your Honor, I'm here to answer any
21 questions you may have.

22 JUDGE BOAL: I don't have any questions. I have read
23 your brief and it answered any questions I might have from
24 your perspective.

25 Anything else, Mr. Tardio?

1 MR. TARDIO: I would just clarify that *Goldstein* was
2 pre-HIPAA, but that the principle still applies, that it is
3 the flip of the situation we have here. Massachusetts had a
4 state law, apparently, according to the order, that did not
5 allow ex parte communication, and the Court clearly held that
6 there was no contrary federal procedural rule, and the flip
7 would be true, that there's no reason that the flip would not
8 still hold true, setting aside HIPAA.

9 JUDGE BOAL: Right. So, my understanding is the PSC
10 says that it is a contrary rule. So, that's why I'm trying to
11 square Judge Zobel's finding. It's a different statute, but
12 it seems to be on the same subject matter.

13 MR. CHALOS: Your Honor, it's our position that the
14 Tennessee statute is inapplicable in federal court. So, the
15 question for your Honor is under the Federal Rules and under
16 federal policy that was enacted by Congress through HIPAA --
17 which absolutely protects private patient health information.
18 That's the heart of what we're concerned about here, is in an
19 ex parte communication there is no protection for the
20 patient's private protected health information, and the
21 Tennessee case -- the *Alsip* case I think is instructive on
22 this point in that it found -- the Tennessee Supreme Court
23 found as a matter of substantive Tennessee law, that it is an
24 unfair burden to place on doctors to say, Doctor, you have to
25 make a distinction in your mind what's relevant and

1 discoverable for the issues in the case versus what is
2 protected, health information that is irrelevant,
3 undiscoverable in that particular case.

4 Congress, through HIPAA, which postdated the
5 *Goldstein* case, expressed very clearly that the policy of the
6 Federal Government is to protect that information except in
7 very limited circumstances. And so, applying federal policy,
8 applying the Federal Rules -- which, by the way, give them
9 every opportunity to get the medical records, which they've
10 already done, and to have depositions of these doctors.

11 Now, mind you, a good portion of these treating
12 doctors are employees of the defendants. Many of these people
13 were treated at Saint Thomas Hospital. When we walked into
14 those depositions, we don't know what they're going to say.
15 That's why we ask questions in depositions.

16 So, to the extent they're suggesting there's some
17 unfairness here, that they're not going to know ahead of time
18 what a witness is going to say in a deposition, that certainly
19 doesn't justify the imposition of the invasion of these
20 patients' privacy and the invasion on the confidential
21 relationship between the patient and their doctors.

22 JUDGE BOAL: All right. Thank you. I will take it
23 under advisement.

24 MR. TARDIO: Thank you, your Honor.

25 MS. JOHNSON: Thank you, your Honor.

1 COURTROOM DEPUTY CLERK YORK: All rise. Court is in
2 recess.

3 (Adjourned, 2:54 p.m.)
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5

6 C E R T I F I C A T E

7 I, Catherine A. Handel, Official Court Reporter of the
8 United States District Court, do hereby certify that the
9 foregoing transcript, from Page 1 to Page 40, constitutes to the
10 best of my skill and ability a true and accurate transcription of
11 my stenotype notes taken in the matter of Multidistrict
12 Litigation No. 13-02419-RWZ, In Re: New England Compounding
13 Pharmacy Cases Litigation.
14

15 March 23, 2016
16 Date

/s/Catherine A. Handel
Catherine A. Handel, RPR-CM, CRR
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